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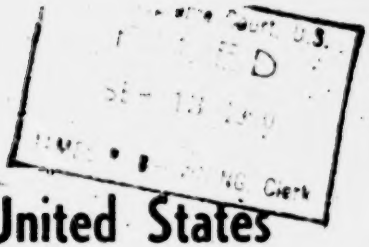

Supreme Court of the United States

OCTOBER TERM, 1960

No. 414

GEORGE B. ZAHNISER, DANIEL H. TRELOAR, Jr., ZENO J. PFAU, JOHN B. McCARTY and ALVAH M. SHUMAKER, Individually and as some of the members of Castle Engineering Company, a Limited Partnership, Petitioners,

v.

ALICE S. HIGGINS, on behalf of herself and other stockholder, HILDA BARKBY, Administratrix of the Estate of Harry Barkby, deceased,
and
SHENANGO POTTERY COMPANY, now SHENANGO CHINA, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Jurisdiction	2
Opinions Below	2
Questions Presented	3
Statutes Involved	3
Statement	4
Specifications of Errors to be Urged	9
Reasons Relied on for Granting the Writ	10
1. The District Court's Findings of Fact should be restored and judgment reversed	10
2. The Court Erred in Disallowing Defense of Laches	20
3. The Decision of the Court below in refusing to allow management expenses is in direct conflict with a decision of the Seventh Circuit	23
4. If the Petitioners are liable, they should be held liable ony for the respective profits received by each and not jointly and severally	27

CASES CITED

Barnes & Tucker Co. v. Bird Coal Co., 331 Pa. 321, 333	22
Bracht v. Connell et al, 313 Pa. 397, 170 Atl. 297	21
Central Railway Signal Co. v. Longden, 194 Fed. 2d 310	23
Choalpiak v. Stahiman, 368 Pa. 83, 81 A. 2d 577	21
Clubb Receiver v. Davidson, 95 Mo. 467, 8 S.W. 545	19
Commissioner v. Duberstein, U.S. ..., 4 L. ed. 2d 1218, 1227, 80 S. Ct.	11
Com. Title Ins & Trust Co. v. Seltzer, 227 Pa. 410, 419, 76 Atl. 77	21
Cowell v. McMillin et al. 177 Fed. 25, 100 C.C.A. 443	19
Darlington v. Reilley, Trustee, et al, 363 Pa. 72	22
Davis v. Pearce, 30 Fed. 2d 85, 88	20
Diedrick v. Helm, 217 Minn. 483, 14 N. W. 2d 913, 153 A.L.R. 649	20
DuPont v. DuPont et al, 246 Fed 129	20

Page

East and West Coast Service v. Papalogis, 344 Pa. 183, 25 A. 2d 339 21

Giles v. Vette, 263 U.S. 553, 68 L. ed. 441, 44 Sup. Ct. 157.. 27

Gilman Paint & Varnish Co. v. Legum, 197 Md. 665, 80 A. 2d 906, 29 A.L.R. 2d 286 27

Greene v. Allen, 114 A. 2d 916, reversed in 121 A. 2d 916.. 20

Guaranty Trust Company v. York, 326 U. S. 99, 89 L. ed. 2079, 2086 21

Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A. 2d 508 19

Hansen et al v. Granite Holding Co., 117 Utah 530, 218 Pac. 2d 274, 281 24

Higgins et al v. Shenango Pottery Company et al, 256 Fed. 2d 504 2

Higgins et al v. Shenango Pottery Company et al, 256 Fed. 2d 504 3

Hornsby et al v. Lohmeyer et al, 364 Pa. 271, 277, 72 A. 2d 291 21

Johnson et al v. King-Richardson et al, 36 Fed. 2d 675 .. 21

Lancaster Loose Leaf Tobacco Co. v. Robinson, 199 Ky. 313, 250 S. W. 997 19

Lincoln Stores, Inc. v. Grant, 309 Mass. 417, 34 N. E. 2d 704 19

Link v. McLeod, 194 Pa. 566, 567 22

Lutherland, Inc. v. Dahlen, 357 Pa. 143, 53 A. 2d 143 .. 19

Overfield v. Pennroad Corp., 146 Fed. 889 21

Rathke v. Griffith, 36 Wash. 2d 405, 218 Pac. 2d 757, 18 A.L.R. 2d 1349 27

Tenth National Bank v. Smith Construction Co., 242 Pa. 269, 287, 89 Atl. 76 20

Twin-Lick Oil Co. v. Maybury, 91 U.S. 587, 23 L. ed. 328.. 19

Weissman v. Weissman, Inc. 374 Pa. 480, 485, 97 A. 2d 870. 24

Wheeling Bridge & Terminal Railway Co. v. Reymans Brewing Co., 90 Fed. 189, 195 21

United States v. Aluminum Company of America, 148 Fed. 2d 416 14

Page

United States v. National Association of Real Estate Boards, 339 U. S. 485, 495, 94 L. ed. 1007, 1016, 70 S. Ct. 711 10

United States v. Oregon Medical Society, 343 U. S. 326, 332, 96 L. ed. 978, 984, 72 S. Ct. 690 10

United States v. United States Gypsum Company, 333 U. S. 364, 395, 92 L. ed. 746, 766, 68 S. Ct. 525 11

United States v. Yellow Cab Company, 338 U. S. 338, 342, 94 L. ed. 150, 153, 70 S. Ct. 177 10

STATUTES AND RULES

Federal Rules, Civil Procedure, Rule 52a 10

Statute of Limitation, Pennsylvania Act of 1867 P. L. 48, 12 P.S. 41 3

Title 28 U. S. C. sec. 1254 2

Uniform Limited Partnership Act, adopted in Pennsylvania as Act of 1917 P.L. 55, 59 P.S. 171-228 3

TEXTS AND LAW REVIEWS

19 Corpus Juris Secundum 161 19

Fletcher Cyclopedia v. Corporations permanent edition, section 862 19

Restatement of Restitution, sections 65 and 158 26

Scott v. Trusts (2d edition vol. 4, page 468 26

65 U. Pa. L. Review, article by William D. Lewis 28

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Petitioners,
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and
SHENANGO POTTERY COMPANY, now SHENANGO CHINA, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE and the ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, George B. Zahniser, Daniel H. Treloar, Jr., Zeno J. Pfau, John B. McCarty and Alvah M. Shumaker, individually and as some of the members of Castle Engineering Company, a limited partnership, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals rendered May 10, 1960, with petitions for re-hearing seasonably made and denied on June 29, 1960, which decision upheld a judgment of the United States District Court for the Western District of Pennsyl-

vania against the Estate of James M. Smith, Jr. and George B. Zahniser, reversed the judgment of the District Court which dismissed Treloar, Jr., Pfau, McCarty and Shumaker and directed the entry of judgment against all of these parties in the sum of $262,456.58. A separate petition for certiorari is being filed on behalf of the Smith Estate by other counsel and both petitions are filed on the joint record.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. section 1254(1). The opinion of the Court of Appeals was filed May 10, 1960. The rules of the Third Circuit permit a petition for re-hearing to be filed within fifteen days and with the right in the Court to extend this time. On petition within the fifteen days, the Court extended the time for thirty days and petitions were duly filed. On June 20, 1960, the Court of Appeals denied the petitions for re-hearing without any opinion.

OPINIONS

In the trial of the case Pfau, McCarty and Shumaker were dismissed at the end of the plaintiff's evidence. The decision is not officially recorded. The derivative stockholders then took an appeal. The case proceeded against other parties and the District Court handed down an adjudication and opinion, which is not officially reported, but is printed in the plaintiff's appendix at pages 261a to 335a.

The decision of the Court of Appeals is reported in 256 Fed. 2d 504 and it was held error at that time to dismiss them.

Further testimony was taken and a second adjudication and opinion were handed down by the District Court. This is not officially printed but is printed at pages 408a to 421a of the same appendix.

Then this decision was appealed and the opinion of the Court of Appeals is officially printed in 279 Fed. 2d 16. In the record will be found the opinion as printed by the Court. In the companion petition by the Estate of James M. Smith, Jr. the appendix includes the last opinion of the District Court and the last opinion of the Court of Appeals.

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether a Court of Appeals on questions of intent and motivation can hold findings of fact clearly erroneous when such findings depend primarily on the testimony of witnesses found truthful by the trial court.

2. Whether in a stockholder's derivative action for alleged deprivation of corporate opportunity the stockholders and the corporation are barred by laches.

3. Whether in an award for damages for alleged deprivation of corporate opportunity deduction should be made for management services.

4. Whether petitioners are jointly and severally liable for the full amount of damages awarded, when petitioners were associates in the entity of a limited partnership.

STATUTES INVOLVED

Pertinent provisions of the Uniform Limited Partnership Act adopted in Pennsylvania (Act of 1917, P.L. 55, 59 P.S. 171-228) are set forth in this petition in the discussion of this fourth question.

The Pennsylvania Statutes of Limitations (Act of 1867 P.L. 18, 12 P.S. 41) is set forth in this petition in the discussion of the second question.

STATEMENT

The facts of this case go back to 1941 when the United States was engaged in the prosecution of war against Germany and Japan.

Standard land mines were metallic and hence subject to magnetic detection. The government had considered the possibility of a land mine with a ceramic shell and with component parts of rubber, cork, etc. and fuse adapter so that the unit would not be subject to detection and detonation. In the spring of 1942 the government financed Onondaga Pottery Company, Syracuse, New York, with a research and development contract for the design and building of such a mine. Later the government placed additional development contracts with Ohio Brass Company in Ohio and with glass at Owens-Illinois Glass Company in Illinois. Army Ordnance appointed an integrating committee. The plans were completed and turned over to the government in January of 1944.

On January 31, 1944, the Pittsburgh District of Army Ordnance mailed to industries in this area a form letter soliciting bids for production of such mines. Blue prints and specifications were enclosed. Among those solicited was Shenango Pottery Company at New Castle, Pennsylvania.

Shenango Pottery is world famous in the production and sale of dinnerware such as Castleton china and American Haviland China. This is its sole corporate purpose and it has never gone outside the scope of ceramics. Its plant is located in New Castle, Pennsylvania, and the affairs were managed by a board of six directors: James M. Smith, Sr. (the founder); James K. Love; Charles W. Read; James M. Smith, Jr. (the son of James M. Smith, Sr.); Jonathan Higgins (whose wife Alice was the daughter of James M. Smith, Sr.); and George B. Zahniser (who was a nephew of James M. Smith, Sr.). All of the directors had offices at the plant. Shenango was a closely-held corporation for the six members of the board with their immediate families owned 82% of the stock.

On February 5, 1944, the board of directors sent directors Smith, Jr., Love, and Zahniser to Onondaga Pottery Company to observe the land mine operation and to consider whether Shenango should submit a bid. The next day these three directors reported to the other directors about their trip, observation and recommendation. The board rejected the proposition to manufacture and assemble mines.

Findings of the District Court

Years later a derivative action was filed by Alice Higgins. All available witnesses were heard and the following is a summary of the facts adjudicated by Judge Willson of the District Court.

At Onondaga Smith, Jr., Love, and Zahniser individually and collectively arrived at the business judgment that Shenango should not bid on the project. The mine assembly business was complicated. (Captain Zens an engineer in charge of the program, testified that it was one of the most unique and difficultt jobs he had ever seen, 8faa). At Shenango there was also a space problem for such an operation. One of the most important factors was labor, for Shenango's wages were frozen by the government for the duration and Shenango was having trouble in the labor market because new industry had the competitive advantage of no restrictions in wages. Those reasons impelled the unanimous decision of the board not to bid on the project. The District Court found that everyone acted in good faith and honesty.

A few days later James M. Smith, Jr. chanced to have lunch at the Castleton Hotel with friends Daniel H. Treloar and Zeno J. Pfau. This was a common meeting place for business men in New Castle. Treloar and Pfau were outsiders of Shenango. Treloar was a life insurance agent of New Castle who had previously had experience as an expediter for a bus company at Pittsburgh. Pfau was head of Chevrolet automobile agency at New Castle and with the curtailment in production and sale of automobiles he converted part of his garage to war contracts in metal work.

Smith, Jr. related the Onondaga trip he had made with Love and Zahniser and the decision of the board of directors Treloar then suggested that maybe the three of them might form a company to assemble the mines with the ceramic work to be sublet. Smith, Jr. and Pfau believed that Treloar could capably manage an assembly group. They decided to explore the possibility. Through Pittsburgh Ordnance they got permission to see the operation at Ohio Brass. They contacted Treloar's brother-in-law in Pittsburgh relative to machines to be built. They contacted possible suppliers. They secured an option to lease the Arena skating rink.

They contacted Shenango for the ceramics at $2.00 per shell. Shenango agreed because this was better than it was getting for finished china.

They proceeded to incorporate as Castle Engineering Company, signed articles of incorporation and circulated a stock subscription. The three of them were investigated and approved by Army Ordnance. A bid was submitted of $7.334 each for 100,000 land mines.

Treloar, Pfau, and Smith, Jr. subscribed for stock and solicited others. Director Love of Shenango was solicited but he declined on account of his age. Director Higgins was solicited but he declined. Read subscribed for part and so did Zahniser. (Before Zahniser subscribed he consulted with his uncle and was advised to do so that it would be good for Shenango). Outsider McCarty and outsider Shumaker, attorney, were solicited and they subscribed.

The Board of Award of Pittsburgh Ordnance met at Pittsburgh on February 21, 1944, to award a contract. Castle's bid was low and the contract would have been awarded to Castle except for the fact that the legal advisor of the Board of Awards raised the question that Castle was four days short of complete iincorporation; the charter was delayed by required legal notice. The government insisted on the immediate award of a contract due to the importance of land mine program for the prosecution of the war. Robert

C. Downie, chairman, and Norman R. Schade, legal advisor to the board of awards, urged that the bid be submitted in the name of Shenango, with Shenango doing the ceramics at $2.00 per shell and subletting the rest to Castle. Smith, Jr. called his father at Shenango and relayed this information and request of the government. A meeting of the board of directors was called, five members present, and such action was taken. The board unanimously resolved that the bid be submitted in the name of Shenango. Then on motion by Love, seconded by Higgins, it was resolved that the contract be sublet to Castle except as to the ceramics.

Thus the contract was awarded to Shenango. Shenango produced the ceramics and Castle did everything else. They had a common interest in the success of the project and both performed its chosen part with amazing success and both made profit. They worked together. Castle needed a conveyor and Shenango used its priority to get it promptly and was paid. Treloar's brother-in-law made necessary machines for Castle. In the early production period Shenango extended credit to Castle, but was fully secured by the account due from the government for mines actually produced.

Originally the Castle group incorporated, but before the issuance of stock shifted to the entity of a limited partnership under the Uniform Limited Partnership Act with Smith, Jr. and Treloar as general partners and with the other associates as "limited partners" who had no active management in the conduct of the business. Under this agreement Smith, Jr. and Treloar shared for management 50% of Castle profits.

Treloar was the executive manager, devoted all of his time to the project and was obliged to make frequent trips out of the city to suppliers. Smith, Jr. was president of Shenango but did double duty as co-manager of Castle.

As the first contract progressed, the government awarded a second contract of 123,000 mines direct to Castle and a total of about 190,000 mines were produced before the government terminated production effective in October of 1944.

The project was so successful in performance that there was not one single rejection and the schedule of delivery was met ahead of time.

When the project was fully completed, Castle profits were renegotiated and diminished, but Shenango's profit was not renegotiated due to its other operations. In the renegotiation, papers were subscribed by the Castle associates showing that its operation began prior to the date on the limited partnership agreement, but erroneously saying that it began in January of 1944 or before. These papers are discussed in the opinions.

Castle's total profit, after renegotiation, was $181,603.71. The government allowed $10,000 for liquidation expenses. Treloar and Smith, Jr. each received $42,765.64 for management expenses and the balance was divided among the Castle associates proportionate to their capital investment. Shenango's profit for just the ceramics was over $240,000.00.

The complaint was not filed until January of 1950. The subject of laches of the plaintiffs will be discussed separately.

The District Court reiterates repeatedly the finding and conviction that the witnesses spoke the truth and that everybody acted in utmost good faith, loyalty and honesty of purpose. However, as a matter of law, following a dictum of a Delaware county case that will be cited, he held that Smith, Jr. and Zahniser were forbidden to join the Castle group, that they must account for all of the profit, with interest at three percent and without deduction for management services and liquidation. The District Court dismissed all the other defendants. Various appeals were then taken to the Court of Appeals.

Findings of the Court of Appeals

What was decided in the first appeal (256 Fed. 2d 504) was that it was error to dismiss Pfau, McCarty, and Shu-

maker at the close of plaintiff's testimony and before the defense opened.

On the second appeal (1960) the case was before the Court on evidential facts adjudicated by the District Court and showing good faith, loyalty and honesty of everybody concerned. The Court of Appeals reversed these findings as "clearly erroneous" and held all of the Castle associates jointly and severaly liable for all the profits with interest, a total of $262,456.58. The Court agreed that Smith, Jr. and Zahniser were not guilty of fraud or deceit but said they were guilty of callous indifference and bad faith. It was held that Castle was benefited at the expense of Shenango, that Castle improperly got profits that should have gone wholly to Shenango, and that each of the Castle associates was liable to the full extent of all the profits.

It was further held that laches of the plaintiff was no defense and it was held that no allowance would be made for the liquidation expenses and no allowance would be made for the salaries earned by Treloar and Smith, Jr.

SPECIFICATIONS OF ERRORS

The Court of Appeals erred:

1. In reversing evidential facts found credible by the District Court as to intent and motivation of the principal parties.

2. In ruling that laches of the derivative stockholders is no defense.

3. In refusing to allow credit for compensation for management services.

4. In holding each associate in Castle jointly and severally liable for the full amount of alleged damages, though the entity was a limited partnership.

REASONS RELIED ON FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S FINDINGS OF FACT SHOULD BE RESTORED AND JUDGMENT REVERSED.

What is here at stake is a highly important principle of judicial administration in federal courts. For the Court of Appeals in this case repudiates the truthfulness of witnesses found credible by the trial courts and fails to adhere to the principle that findings as to design, motive and intent depend primarily upon the credit given to witnesses by the trial court: **United States v. Yellow Cab Company**, 338 U. S. 338, 342, 94 L. ed. 150, 153, 70 S. Ct. 177; **United States v. Oregon Medical Society.**, 343 U. S. 326, 332, 96 L. ed. 978, 984, 72 S. Ct. 690; **United States v. National Association of Real Estate Boards**, 339 U. S. 485, 495, 94 L. ed. 1007, 1016, 70 S. Ct. 711.

The case involves the scope of Rule 52 (a) of the Federal Rules of Civil Procedure:

> ". . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses".

The Court of Appeals rules that the basic findings were "clearly erroneous", but therein wholly disregards the credence of the witness as judged by the trial court, Judge Willson. The Court of Appeals gives a sinister connotation to actions judged by the trial court to be innocent. The depth and clarity of Judge Willson's conviction in the good faith and honesty of purpose of everybody concerned teem throughout both the first and the second adjudication as shown by his detailed findings of the evidential facts.

In discussing Rule 52 (a), Judge Learned Hand says in **United States v. Aluminum Company of America**, 148 Fed. 2nd 416, Second Circuit:

> "However, whatever may be said in favor of reversing a trial judge's findings when he has seen not the witnesses

when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable'. Davis v. Schwartz, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. ed. 289; Adamson v. Gilliland, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. ed. 356; Alabama Power Co. v. Ickes, 302 U. S. 161, 477, 58 S. Ct. 300, 82 L. ed. 374".

The pertinent principle is not to be obscured by the following ruling in **United States v. United States Gypsum Company**; 333 U. S. 364, 395, 92 L. ed. 746, 766, 68 S. Ct. 525, where the Court said:

> "A finding is 'clearly erroneous', when although there is evidence to support it, the reviewing court on the entire record is left with the definite conviction that a mistake has been committed."

But that was a case where testimony was hopelessly in conflict with contemporary documents. There the witnesses could not possibly have been speaking the truth. In the present case there are no conflicting contemporaneous documents.

Even so recently as **Commissioner v. Duberstein.** U.S. . . . . , 4 L. ed. 2d 1218, 1227, 80 S. Ct. . . . . , this Court reiterates the principle that in matters of motive and intent the decision of the factual issues presented must be based on the application of the trial judge's "experience with the mainsprings of human conduct to the totality of the facts" and that "primary weight in this area must be given to the conclusions of the trier of facts".

Factual Issues.

On February 1, 1944, in course of mail Shenango received from Pittsburgh Ordnance a form solicitation dated January 31, 1944, to submit a bid for the manufacture and assembly of land mines; specifications and drawings were en-

closed. On February 5, 1944, the board sent Smith, Jr., Love and Zahniser to Onondaga Pottery at Syracuse, New York, to observe the production there of land mines. Onondaga had a research and development contract from the government. Each of these directors, upon personal observance at Onondaga, arrived at the judgment that Shenango should not submit a bid. The next day they reported to the other directors and they were all unanimous. The proposed assembly would take them afield from ceramics; the assembly process was complicated; there was a problem of space; and there was a serious labor problem because at Shenango there was a government freeze on wages for the duration of the war. These reasons impelled the conclusion not to submit a bid. It was an honest judgment by each of them and without any conflict of interest. This is a summary of findings by the trial judge as to this decision by the board.

The District Court heard in person the detailed testimony of witness Zahniser, director and Vice-President in charge of manufacturing; the testimony of Love by interrogatories; the testimony of Smith, Jr., by deposition (he having died before trial); the testimony of Higgins who says that Smith, Jr. did not misrepresent any facts (143a). Smith, Sr. died before trial and Read was out of the jurisdiction at time of trial. Captain Zens of Army Ordnance testified (84aa) that the assembly job was "one of the most unique and difficult jobs I have ever seen". Contemporaneously, several other potteries in this area likewise rejected the proposal.

The trial judge ably analyzed the evidence and made careful and detailed findings of basic facts. He believed that all these gentlemen were telling the truth; his conviction and conclusion was that each member of the board reached the decision "in good faith" (329a); that Smith, Jr. and Zahniser acted with "honesty of purpose" (275); that there was not a shred of evidence contemporaneously with the events showing that Smith, Jr. was disloyal or motivated by self-interest (275); that in this decision there was "no conflict of interest on anyone's part" (276a); and that the

decision was their business judgment made by each in good faith (276a). These corrections are epitomized in this finding of fact (303a):

> "91. In reaching the decision on February 5, 1944, concurred in by the other members of the Board of Directors within a few days thereafter, that Shenango Pottery Company was not to bid on the land mine project, James M. Smith, Jr. and George B. Zahniser **committed no act of disloyalty, nor were they guilty of any dereliction or breach of fiduciary duty** toward the corporation or its stockholders."

Next from the evidence the District Court made findings of fact that two or three days later Smith, Jr. chanced to have lunch at Castleton Hotel with friends Treloar and Pfau; that Smith, Jr. related the trip to Onondaga and the unanimous decision of the board; that Treloar suggested the three of them form a corporation to assemble the mines and that the ceramics be sublet to Shenango; that the three of them explored the possibility and the result was the formation of a group called Castle and the submission of a bid of $7,034 per mine. Other capital was needed and so others were solicited and some subscribed. Later the group was changed to the form of a limited partnership.

The District Court heard in person the detailed testimony of Treloar and Pfau and read the deposition of Smith, Jr. The Court also heard in person all other subscribers except Read, namely Zahniser, McCarty and Shumaker. The District Court found all of this testimony credible and made findings of fact in detail showing good faith by everybody.

There was no conflict in the evidence whatever except for some papers filed many months later in connection with renegotiations as to the profits. While the limited partnership papers are dated March 18, 1944, the group was organized as subscribing stockholders around the middle of February. Months later in the renegotiation papers it was stated

that the group formed in January, but that was erroneous. Also one paper stated that Smith, Jr. and Treloar had been interested in such a project months previous; this related actually to a gypsum bomb which never went into production.

Plaintiff contended that Smith, Jr. and Zahniser acted in bad faith when they recommended that Shenango should decline the whole opportunity. But the District Court said (275):

> "Plaintiff's evidence on that score comes only from the three exhibits, which are summaries made after the events occurred, and upon which little probative value is placed because of the purpose for which they were prepared."

Indeed, as Judge Willson adjudicates (276a), the first notice Shenango, Smith, Jr. and Zahniser had of the land mine program was the letter from Pittsburgh Ordnance dated January 31, 1944. The Court of Appeals criticizes this statement as bolstering, because Shenango knew of the research and development program at Onondaga. But the context of Judge Willson's statement is crystal clear, because this letter was the first knowledge that the Pittsburgh area would be asked to go into production.

When Castle was in formation and Shenango agreed to do the ceramics for $2.00 per mine, was that fair to Shenango? In the submission of the bid by Castle there was included $2.00 for the ceramic shell which Shenango agreed to produce. This was abundantly fair and nobody can seriously dispute that. For as later developments show the actual cost of production as determined by Shenango accountants was only $0.80, inclusive of management expenses, or a profit of $1.20 each! The bid of Castle on each mine was $7.334, later reduced in the first contract to $6.534, and Castle received a profit of only $0.65 per mine, exclusive of management expense, or a profit of about ten per cent. The total net profit to Shenango for actual profit from this venture during operations only from May to October of 1944 was $248,587.58!

Let us return to the decision of the board made February 6, 1944. The Court of Appeals (page 8 of its printed opinion) says: "The important question is the good faith of Smith, Jr. and Zahniser in making the recommendation upon which the decision was made." Did they bring back a false report or recommendation? If so, they were traitors to their corporation and guilty of fraud and deceit. The District Court says it was an honest report and the Court of Appeals says they were not guilty of fraud or deceit (12). How then could they be guilty of bad faith? Their recommendation was the same as director Love whose honesty is not impugned. Their reasons were unanimously shared by all members of the board. This decision was the same as that of a number of other potteries.

When the Court of Appeals rules that any bad faith permeated this action of the board, the court repudiates the truthfulness of witnesses found credible by Judge Willson and does violence to fundamental principles. The District Court's findings that in this decision everybody acted in good faith and without any conflict of interest should be restored.

Was the birth of Castle a subsequent idea formed after the corporate rejection? The testimony of the witnesses is unanimous on that point except for the later renegotiation papers already discussed. Here deference to the trial judge should be given because of his better understanding of the setting of the facts of the case. Under the corporate rejection rule, hereafter discussed, a director could join with outsiders in Castle if the corporate rejection was in good faith.

Treloar had the right to rely upon the decision of the board (111a). Zahniser, upon solicitation, subscribed to Castle upon the advice of Smith, Sr. that it would be good for Shenango (227a). The Court of Appeals elaborates that Pfau and other limited partners were put on notice. But notice of what? When they subscribed to Castle the only notice they possibly could have was that the board had

unanimously rejected the whole proposition, that Shenango was engaged exclusively in ceramics and that the proposal that Shenango make the mine ceramics was abundantly fair to Shenango.

The events that occurred on February 21, 1944, the scheduled date for the award to be made by Pittsburgh Ordnance, are shown by the detailed testimony of Treloar and the deposition of Smith, Jr., by the detailed testimony of Robert C. Downie, head of the Board of Award, by the detailed testimony of Norman R. Schade, its legal advisor, by the testimony of Zahniser, Higgins, Love (by interrogatories) and by the minutes of the board of directors. The District Court found this evidence credible and made findings of fact showing that because Castle was four days short of complete incorporation the government urged that Shenango be contacted to submit the bid in its own name, with Shenango doing the ceramics and subletting the rest to Castle; that Shenango responded accordingly; that everybody acted in good faith and that both Shenango and Castle thereby made handsome profit.

In spite of the stupendous profit made by Shenango, the Court of Appeals holds that the above actions were a callous indifference to the rights of Shenango stockholders and bad faith. More particularly: (1) That Shenango reversed its position: first it would not touch the proposition but sixteen days later it took the responsibility for the whole contract. The initial proposition would have taken it afield from ceramics, its own field. The initial proposition was to manufacture and assemble mines, and it wanted no assembly operation. But the proposition of February 21, 1944 was in an entirely different posture, for all Shenango would have to do would be the ceramics because in the meantime an effective assembly group had been formed by Castle. Certainly in war contracts there is no prohibition against subletting, even to a concern with interlocking interest, if the transaction is fair.

(2) That objections originally raised by Shenango were quickly overcome by Castle. It solved the objections because

Shenango did not have to embark into an assembly business; it could stay in its chosen field. The mines did not have to be assembled at its plant where space was crowded. Most of all it solved the labor problem, for Castle could get workers without without any restrictions on rate of pay while Shenango's wages were frozen. And it had a Treloar!

(3) That Shenango accepted full liability for performance of the whole contract. But Shenango had a big stake in the profits; it was interested in profits to be made, rather than in the possibility of failure. Shenango was well justified in the faith of its own competency and both Shenango and the government had confidence in the capabilities of the assembly group. Even the Court of Appeals comments on the achievement of Smith, Jr., Treloar, and Pfau in the few days preceding the award (pages 8 and 9 of printed opinion). Certainly to a layman it would seem that an award to Shenango with Shenango doing the ceramics and subletting to Castle is the equivalent of an award to Castle with Castle subletting the ceramics to Shenango. Add to this the fact that the shift was at the insistence of lawyers in government. There was no contemporaneous thinking that liability hinged on the success or failure of the Castle firm that existed only on paper (see page 11 of opinion). For back of the group there was money subscribed, there was chosen leadership and the domonstration of their capabilities.

(4) That three directors had joined the Castle group. This is answered by the corporate rejection cases that will be mentioned later.

(5) That the decision of Shenango's board was bad judgment and that it was influenced by the fact that on February 21, 1944, three of its board members then belonged to Castle. But this presents only the common situation of interlocking interests where the test is fairness. Consideration must be given to the fact that Smith, Jr. was not present and did not vote and to the business judgment of the three directors who were not participants in Castle. Of these, take director Higgins, for instance. Can it be said that he was

unduly influenced by Smith, Jr. being a movant in Castle as opposed to the fact that Higgins and his wife owned substantial holdings of stock in Shenango? Was it bad judgment for Shenango to take the part of the work that it wanted and to reject being foisted into assembly?

That the decision of the board was good judgment is evidenced by the tremendous profit made by Shenango. What other alternative was there? Onondaga got into land mines as a government research and development project and must have some assembly experience. But Shenango and some other potteries chose to remain exclusively in ceramics. That was a management policy for its board to decide and not the Court of Appeals sixteen years later. When on February 21, 1944, the opportunity was presented to submit the bid in its name and to sublet the assembly to Castle, this was a golden opportunity for Shenango. It was the Castle group that made this opportunity possible.

Upon the award of the contract, as pointed out by Judge Willson (414a), it was to the interest of both Shenango and Castle that the operation was successful. Castle helped Shenango in that Treloar's brother-in-law made necessary machines for Shenango. Shenango helped Castle in securing a conveyor, since it had a priority for materials and it would have taken weeks for Castle to get a priority as a new business. Shenango helped to secure other materials. Shenango was fully paid for everything. When assembled mines started to roll off the conveyor belt, Shenango extended credit to Castle, but was fully secured by the government's contract to pay Shenango for actually completed mines and within a few weeks Shenango was fully paid. While the first contract for 100,000 mines was in performance, the government awarded a second contract for 100,000 mines, with the consent of Shenango, direct to Castle. This time it was Castle that accepted "full liability" although the major profit went to Shenango.

As mentioned by Judge Willson (414a), the method of doing business was for the common good.

. The findings of fact by the District Court should be restored and the case must be viewed in the light of utmost good faith and loyalty. The case then reduces itself to a question of law.

In the corporate opportunity rule a business opportunity directed to a corporation is diverted by an officer to his own use and the corporation has the right of legal redress for the usurpation of the opportunity. Leading examples are the cases of **Guth v. Loft, Inc.**, 23 Del Ch. 255, 5 A 2d 503, and **Lutherland, Inc. v. Dahlen**, 357 Pa. 143, 53 A. 2d 143. In such cases business that was intended for a corporation never got to the corporation but was grabbed personally by a director or officer and the corporation was betrayed by fraud and disloyalty.

But petitioners aver that the present case is one for the corporate rejection rule, as thus stated in 19 **Corpus Juris Secundum**, page 161:

> ". . . . after a corporation has refused or failed to obtain a contract with a third person a corporate director or officer is not precluded from contracting in his own behalf with such person".

and **Fletcher Cyclopedia on Corporations**, permanent edition, section 862 says:

> "A finding of corporate opportunity will be denied (a) wherever the fundamental fact of good faith is determined in favor of the director or officer charged with usurping the corporate opportunity . . . ."

Cases in point are **Cowell v. McMillin et al**, Ninth Circuit, 177 Fed. 25, 100 C.C.A. 443; **Twin-Lick Oil Co. v. Marbury**, 91 U.S. 587, 23 L. ed. 328; **Clubb, Receiver v. Davidson**, 95 Mo. 467, 8 S.W. 545; **Lancaster Loose Leaf Tobacco Co. v. Robinson**, 199 Ky. 313, 250 S. W. 997; **Lincoln Stores, Inc. v. Grant**,

309 Mass. 417, 34 N.E. 2d 704; **Diedrick v. Helm**, 217 Minn. 483; 14 N.W. 2d 913, 153 A.L.R. 649; **Davis v. Pearce**, 30 Fed. 2d 85, 88; **DuPont v. DuPont et al.**, 246 Fed. 129. This is especially true where the corporation reaps a benefit.

The District Court fell into error in holding that directors of Shenango could not join the Castle group. The Court followed a dictum in the lower court decision of **Greene v. Allen**, 114 A. 2d 916, (reversed in 121 A. 2d 916) which is out of line with the appellate decisions above. For when the corporation rejects, there is no conflict of interest.

Tenth National Bank v. Smith Construction Co., 242 Pa. 269, 287, 89 Atl. 76, cited by the Court of Appeals, is not in point for there the board of directors never considered and hence never rejected the proposition there involved and the business was such that the company might ordinarily do.

Hence the findings of fact of the District Court should be restored and the judgment of the Court of Appeals should be reversed as to each petitioner.

II. THE COURT ERRED IN DISALLOWING DEFENSE OF LACHES.

Upon the first appeal to the Court of Appeals, the Court rejected laches as a defense, in this language (256 Fed. 2d 504, 511):

> "Laches is not an element in the pending litigation. Shenango's right to recovery at law was governed by the Pennsylvania Statute of Limitation. The action before us was commenced well within that period."

The Pennsylvania Act in question is the Act of March 28, 1867, PP.L. 38, p. 1, 12 PS 41, which fixes a six-year limitation on "any suit.....at law or in equity.....brought.....against any.....director.....to charge him.....with any neglect of duty."

The Court of Appeals was clearly in error both as to Federal and State law in applying this statute. The case at bar is in the Federal courts solely because of the diversity of citizenship. In such case limitation of action is according to state law: **Wheeling Bridge & Terminal Railway Co. vs. Reymans Brewing Co.**, 90 Fed. 189, 195 (CCA. 4, 1898); **Overfield vs. Pennroad Corp.**, 146 Fed. 889 (CCA. 3, 1944). In **Guaranty Trust Company vs. York** 326 US 99, 89 L. ed. 2079, 2086, a case where jurisdiction depended upon diversity, the Court said:

> "The outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."

The law of Pennsylvania on the subject is very clear. A suit in equity may be barred by laches before the statute of limitations has run. In **Hornsby et al vs. Lohmeyer et al**, 364 Pa. 271 277, 72 A. 2d 294, a derivative action in which plaintiffs sought to recover for fraudulent dealings with corporate property, the Court, by Stern, J. (later C J) said:

> "Moreover, even apart from the statute of limitations, plaintiffs are clearly guilty of laches which, appearing on the face of the bill, can be taken advantage of by preliminary objections: Leseman-Frederick Co. vs. Diebold et al, 359 Pa. 89, 92." Kinter vs. Com. Trust Co., 274 Pa. 436, 118A. 392, 439, 440. Watts Appeal, 78 Pa. 380, 395.

If the plaintiffs in a derivative suit have been guilty of laches so that they could not recover the corporation in whose right they sue cannot recover: **Johnson et al vs. King-Richardson et al**, 36 Fed. 2d 675 (First Circuit) 1930.

The District Court followed the mistaken dictum of the Court of Appeals in its first opinion and in the second appeal the Court of Appeals once more refused to consider the defense of laches.

Twin Licks Oil Co. vs. Marbury, 91 US 587, 23 Law ed. 328, 321, represents the general view of the federal courts as to this problem. In that case, defendant director lent money to the corporation, which was in financial distress. He had to foreclose and buy in the property. His money and skill made it a valuable property. Held, Miller, J.: The plaintiff stockholders, having waited for four years before bringing suit, were guilty of laches and could not recover. This is general law.

Barkby, one of the plaintiffs, who owned two shares of Shenango stock, intervened after the statute of limitations had run. His right is barred: **Darlington vs. Reilley, Trustee, et al.** 363 Pa. 72; **Link vs. McLeod**, 194 Pa. 566, 567.

The principal plaintiff, Alice Smith Higgins, is daughter of Smith, Sr., founder of Shenango, the sister of Smith, Jr., president, and the wife of Higgins, treasurer of the company, through whose hands passed all the expenditures complained of in this action. He made the motion to have Shenango accept the ceramic part of the contract and sublet the assembly to Castle. Alice Smith Higgins and her husband declined to participate in the land mine project but accepted all the dividends and waited five years and eleven months before bringing suit. Meantime the defendants paid income tax on their profits before renegotiation.

Plaintiffs were clearly guilty of laches. Only the common sense of Justice Miler, employed in **Twin Licks Oil Company vs. Marbury** (supra) is needed to discern that plaintiffs did know all about the transaction. In any event, "Laches is not excused by simply saying: 'I did not know'." **Barnes & Tucker Co. vs. Bird Coal Co.**, 334 Pa. 324, 333.

III. THE DECISION OF THE COURT BELOW IN REFUSING TO ALLOW MANAGEMENT EXPENSES IS IN DIRECT CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT

In **Central Railway Signal Co. v. Longden**, 191 Fed. 2d 310, Seventh Circuit, Longden, president of the plaintiff corporation was ordered to take a Navy contract for plaintiff corporation, but instead he organized his own company, "Victory Corp.", and had the contract awarded to it. Although defendant had acted fraudulently and all the net profits were held to belong to plaintiff, Longden was held entitled to credit for the sums paid to him for managing the operations of Victory. The Court of Appeals saying:

> "The trial court ordered Longden to repay to Victory the salaries drawn by him as its president during the years of its operation and thereafter from September, 1942, to June 30, 1949, totalling $84,000.00. There is no evidence that Victory's operations were not properly managed. They involved production of some $5,000,000 worth of ammunition for the United States. Such undertakings are not self-operating; they involve tremendous executive and administrative activities. Longden, president and general manager, discharged those functions. No complaint is made of his efficiency, his ability or his success. Though we agree that the earnings of Victory belong to plaintiff, we can conceive of no reason in equity why the reasonable actual costs of management, administration, and production, from which sprang the profits, should not be allowed. These include the salaries and wages of all contributing to the final result — a profitable operation . Those expenses, those salaries, would have had to be paid if plaintiff itself had conducted the enterprise; they are a part of the cost of goods sold. . . . . Inasmuch as no attack is made upon the reasonableness of the sums paid, equity demands that the judgment for repayment of salaries paid to Mr. Longden be reversed. Otherwise, **plaintiff would be unduly enriched.**" (Emphasis ours.)

In **Hansen et al vs. Granite Holding Co.**, 117 Utah 530, 218 Pac. 2nd 274, 281, where a son fraudulently bought from father, president of Granite Corporation, valuable real estate for 10% of its value, he was required to make restitution, but was entitled to deduct the value of his services and his expenses.

Our reseach discloses no cases whatever to the contrary. A fortiori, when one acts innocently but mistakenly, he is entitled to compensation for services: **Bracht v. Connell et al**; 313 Pa. 397, 404-5, 170 Atl. 297. Where an agent or other fiduciary fraudulently takes title in his own name to property which should go to the principal, he must make restitution, but he is entitled to deduct what he has invested in the property: **Weissman v. Weissman, Inc.**, 374 Pa. 480, 485, 97 Atl. 2d 870; **Choalpiak v. Stahlman**, 368 Pa. 83, 81 A. 2d 577; **East and West Coast Service v. Papalogis**, 344 Pa. 183, 25 A. 2d 339; **Com. Title Ins. & Trust Co. v. Seltzer**, 227 Pa. 110, 119, 76 Atl. 77.

Under the order of the Court of Appeals, the defendants are liable jointly and severally for the sum of $262,456.58. This sum is supposed to represent the profits made by the limited partnership Castle Engineering Company, plus interest. The profits were arrived at by deducting from the gross receipts of Castle, the cost of labor and materials to make the mines, but allowing **nothing** for the cost of management. Castle was managed by Daniel H. Treloar and James M. Smith, Jr. Treloar had no connection with Shenango but Smith, Jr. was president of Shenango.

The operation was an extensive one. A total of 191,111 land mines were manufactured for a total price of $1,109,132.81 (307a). Shenango made the ceramic parts and sold them to Castle for a total price of $388,333.00 and a profit to Shenango of $234,486.09. Shenango's profit was never renegotiated, but Castle made a profit after renegotiation of $181,603.71. Shenango's percentage of profit was 60.4% Castle's was 13.5% (365aa).

Great difficulties were encountered. The ceramic parts made by Shenango consisted of two bowl-like parts, but fuse adapters had to be threaded to fine tolerances into the china parts, a procedure with which Shenango—which had made only china ware—was not familiar (87aa). The mines had to pass severe underwater tests and dropping tests (71aa, 85aa, 89aa). Smith, Jr. was an engineer. In addition to his work as president of Shenango, he took on the added duties as one of the managers of Castle. He worked fourteen to sixteen hours a day during the initial period (78a). Ohio Brass Company and Onondaga Pottery Company had previously been given research contracts to design the mines and to perfect manufacturing techniques (291a, 295a); but Smith, Jr. was the one who licked the problem of tolerances (121a, 132a, 252aa).

Treloar was the answer to the problem of assembly. He had had some experience (104aa). About twenty-five different parts were involved. He proved to be exactly the man for the job. He knew that to manufacture a new product on a wartime market, he had to get to the suppliers first (105aa). He found suppliers everywhere (107aa). He knew he could not depend on the ordinary employment services for labor (108aa, 111aa). He obtained labor for his suppliers, notably Stokes Rubber Company (117aa, 119aa) and performed similar services for other suppliers (120aa).

Treloar was completely successful. Defendants' Exhibit is (347aa) is Major Cox's appraisal of Treloar's service. Plaintiffs' Exhibit 13 (309aa) is a letter from Captain Richard G. Zens of Ordnance to Treloar praising, in the highest terms, his work and that of Smith, Jr. These were disinterested witnesses who know what Castle had been up against. Treloar worked eighteen hours a day during the entire Castle operation (102aa-103aa). He had to neglect his insurance business completely (175aa). He devoted all of his time to Castle's affairs for the first year, 75% of his time the second year, and 50% of his time for the third year, plus parts of two more years (177aa-197aa.)

The agreement among the defendants was that Treloar and Smith, Jr. were to receive one-half the profits for managing Castle. Accordingly, each was paid the sum of $42,765.64 for services rendered over the five-year period (367aa). On this point, the trial judge said: "If he is entitled to anything, he is entitled—probably entitled to that, it seems fair to me (222aa)." Pittsburgh Ordnance gave a large share of the credit to Treloar who abandoned his own business to lead Castle. He had no duty to Shenango. But he and his associates are to be allowed nothing for the work of Treloar and Smith: no wages, no profits, nothing. Now he, with the other petitioners, must pay back the compensation he received long after he paid income tax on his salary.

Why were the costs of management not allowed as a credit in the matter of restitution along with the other costs. Neither the District Court nor the Court of Appeals answers this question.

In all events the judgment of the Third Circuit in this case should be modified by deducting the value of the management services, because:

1. The decision is contrary to case law and reasoning.

2. The decision is contrary to ordinary principles of contract. The contract was entered into and executed in good faith by Castle and Shenango received the benefit of performance: **Ketchum et al v. Conneaut Lake Co.**, 309 Pa. 224, 233, 163 Atl. 534; **McClain F. Corp. v. Lineinger**, 341 Pa. 364, 367, 19 A. 2d 478.

3. The decision is contrary to the principle of unjust enrichment and restitution. Shenango can be entitled to restitution only if compensation be allowed for the management services of Castle: **Restatement of Restitution**, sections 65 and 158; 4 **Scott on Trusts** (2nd ed.) 468.

IV. IF THE PETITIONERS ARE LIABLE, THEY SHOULD BE HELD LIABLE ONLY FOR THE RESPECTIVE PROFITS RECEIVED BY EACH AND NOT JOINTLY AND SEVERALLY.

A. As to the Limited Partners

The limited partners aver that the decision of the Court of Appeals holding all defendants jointly and severally liable for the full amount is in conflict with the provisions of the Uniform Limited Partnership Act, adopted in Pennsylvania by the Act of 1917 P.L. 55, 59 P.S. 171-228; that it is in conflict with the principles of **Giles v. Vette**, 263 U.S. 553, 68 L. ed. 441, 44 Sup. Ct. 157 (1924) which liberally construes this uniform law and that the decision is in conflict with state decisions under the Uniform Act: **Rathke v. Griffith**, 36 Wash. 2d 405, 218 Pac. 2d 757, 18 A.L.R. 2d 1349; **Gilman Paint & Varnish Co. v. Legum**, 197 Md. 665, 80 A. 2d 906, 29 A.L.R. 2d 286. There are no Pennsylvania cases in point since the adoption of the uniform act in 1917. The issue here is highly important because the Act is now in effect in 38 states and there should be uniformity in the decisions of a uniform act.

As to the limited partners in Castle, the Act and the cases show that the liability of each is the same as if he were an incorporator. This limitation is a limitation as to extent of **liability** and not merely as to extent of **execution.**

Prior to the uniform act adopted in Pennsylvania in 1917, many states including Pennsylvania had a limited partnership act, New York being the first which adopted its act in 1828. In the decisions prior to the uniform act, most courts proceeded on the basis that its statute must be construed strictly. When the present case was first before the Court of Appeals, the Court said that it was doubtful whether there was effective compliance with the Act (256 Fed. 2d 504, 510), but the Court was thinking in terms of the old decisions under the old Act.

William D. Lewis, draftsman of the new act, writes on the subject in 65 U. Pa. L. Review 715, 723:

> "Practically all the differences between the new Uniform Act and the existing statutes are due to the desire of the Conference to present to the legislatures of the several states an act, under which a person willing to invest his money in a business for a share in the profits, may become a limited partner, with the same sense of security from any possibility of unlimited liability as the subscribers to the shares of a corporation".

The Commissioners in their note in submission of the Act in 1917 emphasize that the person who contributes capital only, though called a limited partner, is not in any sense a partner. He is merely an investor or contributor. Further, the Act itself makes clear that it should be given liberal interpertation and that a limited partner is not liable to creditors unless they have suffered in reliance on statements in the articles.

The articles of limited partnership in this case were drawn carefully in compliance with the Act. The articles are copied in full at page 147a. No limited partner had any control in the management of the business. The contributions were all fully made in time. The articles were recorded with some inadvertent tardiness. So far as Shenango was concerned, there was no loss suffered by reliance on the articles. In fact Shenango knew from the beginning that the contributors all wanted limited liability because they were planning to be incorporated. Nor did Shenango suffer any loss by the tardiness in recording the articles. Hence under the Uniform Act, which applies to this case, Shenango is not in position to complain about the formation of the limited partnership and is not in position to hold the limited partners (investors) as general partners. As to Shenango and as to the parties among themselves, the Act fully applies.

Pertinent provisions of the Act are:

Section 1. "..... The limited partners as such shall not be bound by the obligations of the partnership"

Section 7. "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes control of the business".

Section 11. "A person who has contributed to the capital of a business conducted by a person or partnership, erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided, that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

Section 17. (2) "A limited partnership holds as trustee for the partnership . . . (c) Money or other property wrongfully paid or conveyed to him on account of his contribution" . . . (1) "When a limited partner has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return."

Section 26. "A contributor, unless he is general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership".

Section 28. (1) "The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act."

(2) "This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those States which enact it."

Relative to the Act, the Court of Appeals in the first appeal, says at page 510:

> ". . . . The limitations on liability have no relevancy to a limited partner's being held to answer for profits realized on his contribution to the capital of the partnership. The sections referred to would operate in this instance only if an attempt were made to collect the whole judgment against the partnership from one of the alleged limited partners; in such a case that partner could not be held for more than the amount of his own profits plus his contribution to the partnership funds."

Continuing at page 510, relative to investors Pfau, McCarty and Shumaker, the Court says:

> ". . . they must make restitution for the benefits they have received as a consequence of the breach of trust."

But this is a personalized or individual liability, not a joint and several liabilty.

The position of the limited partners or investors is simply:

1. Any question of adequate compliance with the Act must be resolved in the liberal light of the Uniform Act rather than on old decisions under the old act. The limited partnership status was fully effective as to Shenango because it suffered no loss by reliance on the articles.

2. The only reason the contributors are properly parties to this action is to enforce their liability to the partnership (section 26 above). The investors are not liable directly to Shenango; any liability of the investors is to Castle Engineering Company and the Company to Shenango. Hence any liability of the investors is personal.

3. As to Zahniser, during the trial of the case he offered to return profiits and interest; this was approved by the directors but rejected by the District Court. He made

tains that he should be cleared under section 11 in all events, just as in Giles v. Vette above. In Giles v. Vette, there was no effective limited partnership, yet section 11 nevertheless was held to apply. But in the present case, for the reason shown, the association was fully effective as to She ngo.

4. What the Court of Appeals said above in the first appeal should carry over in substance to the judgment entered under the second appeal with these exceptions:

(a) The investors should not be required to account for their invested capital; it was used in the course of the business just the same as if they were incorporated; their liability should be limited to profits plus interest under section 17(2). The claim is not contractual; it is for profits. Their liability should be precisely the same as subscribers to the shares of a corporation.

(b) The limitation of liability of the investors should be reflected in the judgment itself. The judgment should be modified by entering judgment on the basis of the extent of each individual's profits plus interest. Thus Shumaker, who contributed $500 and received $860.73 profits, should not be held liable for $262,456.58. In the alternative the judgment should be modified by stating that the composite judgment is limited in execution to the profiits each received, with interest.

5. Finally, the limited partners assert that if the Court declines to grant this petition and declines to modify the judgment, then the case should be remanded to the District Court to entertain a petition to limit execution on the judgment to the extent of personal profits each received with interest or in all events to the extent of profits, interest and capital invested. This litigation has extended over a course of eleven years. The question here presented was raised in the Court of Appeals in petitions for rehearing but those petitons were dismissed without any opinion. The District Court should be advised what action iit can take in resolving the rights of each defendant to Shenango and in resolving the rights of the defendants among themselves.

B. As to Each Individual Defendant

The petitioners earnestly maintain that their efforts benefited Sheango and that without their willingness to assemble the mines the venture would never have been entertained by Shenango; that their actions were a benefit and not a detriment to Shenango.

But if the rationale of the Court of Appeals is sustained, each defendant should be required to make restitution only for the benefit, namely the profit, which he received. In no event should anyone be held to a joint and several liability.

1. The basis of the alleged claim is unjust enrichment and the inquiry and decision should be the individual unjust enrichment of the respective individuals. The claim is for restitution of benefits received and the benefits were only what went to each person instead of going to Shenango. On this basis of unjust enrichment and restitution of benefits, each should be called upon to make restitution only of what he himself received.

2. Under the Uniform Limited Partnership Act the limited partners are liable to the partnership for the return of money wrongfully paid to them on account of their contribution. This is the imposition of a constructive trust on the individual's profit. The same imposition should apply, and no greater, to the duty of each general partner to restore profits.

3. The general partners are not liable jointly, or jointly and severally, because Shenango's claim is not as a creditor in an assumpsit or contractual action but is a claim based on constructive trust.

4. Nor is this a case of fraud and deceit where for punitive reasons the law applies joint and several liability. The District Court rules that this is not a case of fraud and deceit, but one of utmost good faith and loyalty. The Court of Appeals agreed that it was not a case of fraud or deceit

5. This is a highly technical case where the trial judge believed that all parties were innocent of any intentional wrongdoing and that the actions of these defendants vastly benefited Shenango. It is thoroughly inequitable to require any of these persons to repay more than he personally received in profits. No one should be saddled and required to pay what somebody else received.

6. This claim was never asserted until years after the close of Castle's business and liquidation and distribution of profits and capital. It arose then only as the aftermath of an unfortunate family fight between Alice Higgins and her brother, Smith, Jr. Had the claim been asserted while Castle was in operation, the profits and capital could have been withheld pending court decision. The plaintiff had full knowledge of the facts from the beginning. There has been a change of position by the long lapse of time. The partnership has no tangible assets and its profits and capital have been distributed. Now there is the problem that some defendants may be solvent and some may be insolvent. Therefore it would be unjust that any defendant be required to pay to Shenango more than his own share of profits.

It is respectfully submitted that there is here presented a proper occasion for the supervisory power of this Court.

GEORGE B. ZAHNISER

DANIEL H. TRELOAR, Jr.

ZENO J. PFAU

JOHN B. McCARTY

ALVAH M. CHUMAKER

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September 10, 1960.